STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2003
v	No. 240593 Washtenaw Circuit Court
SAMUEL HAMPTON, Defendant-Appellant.	LC No. 01-001236-FC

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of unarmed robbery, MCL 750.530. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to fifteen to twenty-five years' imprisonment. We reverse and remand.

Defendant argues that plaintiff failed to file the habitual offender notice within the time requirements of MCL 769.13(1). Defendant did not raise this issue below, and we thus review it using the plain error standard of review. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if a clear or obvious error occurred that affected defendant's substantial rights. *Id.* at 763.

MCL 769.13(1) states:

> In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense. [Footnote omitted.]

The lower court docket sheet indicates that defendant was arraigned on the complaint on August 9, 2001, but was not arraigned on the information until August 22, 2001. The plain language of MCL 769.13 indicates that it is the arraignment on the information that triggers the twenty-one-day filing period. Because the prosecutor filed the habitual offender notice on September 5, 2001, fourteen days after defendant's arraignment on the information, the prosecutor complied with MCL 769.13. No plain error occurred.

Defendant also argues that the prosecutor presented insufficient evidence to support the unarmed robbery conviction. We agree. When reviewing the sufficiency of the evidence presented to support a conviction, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that all of the elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992).

"The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." MCL 750.530; *People v Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994). In addition, our Supreme Court recently held that the force used to accomplish the taking underlying a charge of unarmed robbery must be contemporaneous with the taking. *People v Randolph*, 466 Mich 532, 536; 648 NW2d 164 (2002).[1]

Viewing the evidence in the light most favorable to the prosecutor, we conclude that the evidence was insufficient to support defendant's unarmed robbery conviction because a rational trier of fact could not have found beyond a reasonable doubt that defendant used force at the time of the taking. Kmart loss prevention associate Charles Allen testified that he observed defendant hide an electric hair clipper under his windbreaker. He testified that he then saw defendant and his acquaintance select "something" in the knives section of the sporting goods department. However, there was no testimony or other evidence presented that established that defendant used force when he took the hair clipper off the shelf and concealed it in his windbreaker. Nor was there evidence that defendant used force when selecting something from the sporting goods department. Instead, the only evidence regarding defendant's use of force was Allen's testimony that defendant used force to escape from the store after taking the property. The testimony indicated that when defendant reached the interior sliding doors of the store, he set off the security alarm, prompting Allen to identify himself as a loss prevention associate. Only then did defendant allegedly pull out a knife, tell Allen "I'll stab you," jab the knife toward Allen, and run to the parking lot.

Because the evidence of force presented in this case did not establish that defendant used force to accomplish the taking or that the force used was contemporaneous with the taking, a rational trier of fact could not have found that the prosecutor proved the elements of unarmed robbery beyond a reasonable doubt. See *Randolph, supra* at 536. Accordingly, the evidence at

[1] Our Supreme Court decided *Randolph* on July 11, 2002, while defendant's appeal was pending. Generally, judicial decisions are to be given complete retroactive effect, and prospective application is limited to decisions that overturn well-established case law. See *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996). Although *Randolph* rejected this Court's use of the "transactional approach," which indicated that a defendant could be properly charged with robbery if he used force after the taking of an item but before reaching a place of temporary safety, the *Randolph* Court clearly stated that it never recognized this approach and that the approach contradicted statutory law and common-law history. *Randolph, supra* at 540-541. Accordingly, we conclude that *Randolph* represents a clarification of existing law rather than an overruling of clear and well-established case law and that it therefore applies retroactively to the instant case.

trial was insufficient to support defendant's conviction. We therefore reverse defendant's conviction, vacate his sentence, and remand this case for a retrial on any and all appropriate, lesser charges arising out of the events in question.[2] In light of our disposition, we need not address the additional issues raised by defendant on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

[2] We note that the case of *People v Bearss*, 463 Mich 623, 632-633; 625 NW2d 10 (2001), suggests that a remand for entry of a conviction on the cognate lesser-included offense of larceny in a building, MCL 750.360, might be appropriate in the instant case. We decline to allow the entry of such a conviction, however, in light of the Supreme Court's more recent decision in *People v Cornell*, 466 Mich 335, 354-358; 646 NW2d 127 (2002), in which the Court disavowed instructing a jury with regard to cognate lesser-included offenses. See also *People v Mendoza*, 468 Mich 527, 532-533; 664 NW2d 685 (2003) (discussing *Cornell*). Indeed, we conclude that if a jury cannot even be *instructed* with respect to a cognate lesser-included offense, we may not remand for entry of a conviction of such an offense.

We further note that the jury's decision to convict defendant of unarmed robbery, even though he was charged with armed robbery, essentially acts as an acquittal of charges involving the use of the knife. Therefore, on remand, the prosecutor may not charge defendant with felonious assault, MCL 750.82.